Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to Get Away with Murder

Elizabeth B. Megale

Campbell University School of Law, berenguer@campbell.edu

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Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to “Get Away with Murder”

Elizabeth B. Megale

Abstract

This Article identifies as problematic the intersection of Florida’s Immunity Statute and its current Castle Doctrine, which presumes reasonable fear where one acts in self-defense in the “castle.” The coupling together of immunity and the presumption of reasonable fear creates a bar to prosecution in Castle self-defense cases. The Article addresses problems associated with the lack of guidelines to ensure the equal application of the law to self-defense cases, and the lack of procedural tools available for the assertion of immunity arising from a self-defense act.

Don’t Dial 911 — Use .357

I. Introduction

After two years in jail awaiting trial on a charge of first degree murder, Jimmy Ray Hair was granted immunity under Florida statute section 776.0322 and released from jail by Florida’s First District Court of Appeal. In Hair v. State, Hair shot and killed Charles Harper following

1 B.B.A. (1998), Mercer University; J.D. (2002), Mercer University School of Law. Professor Megale is an Assistant Professor of Law at Barry University School of Law, Orlando, Florida. This Article was presented at the New Scholars Workshop, Southeastern Association of Law Schools in 2009.

The author wishes to thank in particular Professors Judith Koons and Patrick Tolan for their patience, guidance, and assistance during the process of writing this piece. She also expresses appreciation to her very helpful research assistant, Ana Cristina Torres, and to Barry University School of Law for its very generous support.

1 The author saw this on a bumper sticker in Orlando, Florida in March 2010. Five years after passage of the Stand Your Ground laws in Florida, it typifies the opinion of many Floridians that it is better to use a gun than to call the police.

2 FLA. STAT. § 776.032 (2005).

3 Hair v. State, 17 So. 3d 804, 806 (Fla. Dist. Ct. App. 2009) (per curiam); see also Will Brown, Man Facing First-Degree Murder Charge Freed, TALLAHASSEE DEMOCRAT, July 22, 2009.
a verbal argument at a nightclub on July 21, 2007. Though the facts were somewhat disputed, Harper apparently leaned into a vehicle in which Hair was seated on the passenger side and began to struggle with Hair. Harper’s friend attempted to pull Harper back away from the car, but Hair pulled out his gun and shot Harper before he had fully retreated. Hair claimed that the gun fired accidentally when he tried to hit Harper with the gun.

Hair’s attorney filed a motion to dismiss the charges pending against him, but the trial court denied the motion primarily because “there were disputed issues of fact which precluded granting of pretrial immunity.” On appeal, the First District held “that a motion to dismiss based on ‘Stand Your Ground’ immunity cannot be denied because of the existence of disputed issues of material fact.” The court further held that no material facts were in dispute in Hair’s case.

Based on the plain language of Florida statute sections 776.032 and 776.013, Hair never should have been arrested for shooting Harper. Section 776.013 establishes a presumption of reasonable fear of death or great bodily harm when another is in the process of unlawfully and forcefully entering an occupied vehicle, or has already done so. The

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5 Hair, 17 So. 3d at 805.
6 Id.
7 Id.
8 Id.
9 Id. at 806. This ruling conflicts with the Fourth and Fifth Districts. See cases cited infra note 29.
10 Hair, 17 So. 3d at 806.
12 Id. § 776.013. Subsection 776.013(1) states:

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
(a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person’s will from the dwelling, residence, or occupied vehicle; and
undisputed facts showed that Harper was forcefully and unlawfully entering the occupied vehicle through the passenger window. The statute makes no exception for retreat or attempted retreat. Additionally, section 776.032(2) prohibits law enforcement from arresting a person for using force unless there is probable cause that the injured or deceased party had not unlawfully or forcefully entered the occupied vehicle. In this case, no evidence at all indicated that Harper had lawfully entered the vehicle, and in fact, the undisputed evidence showed the opposite to be true. Unfortunately, law enforcement and the prosecution did not follow the law as provided in sections 776.013 and 776.032, and Hair spent two years in jail attempting to assert his right to immunity.

Although numerous problems exist with Stand Your Ground laws, this Article focuses on those grievous harms resulting from the combination of a presumption of reasonable fear and immunity. Read in pari materia, sections 776.013 (castle doctrine) and 776.032 (immunity statute) of the Florida statutes create an absolute and irrebuttable presumption that an individual who kills or harms another within that individual’s “castle” has acted in self-defense and cannot be prosecuted. The

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Id. § 776.013(1)(a)-(b).

13 Hair, 17 So. 3d at 805.
14 Id. at 806; see also Fla. Stat. § 776.013.
16 Hair, 17 So. 3d at 805.
17 See id. at 806 (Because Harper “unlawfully and forcibly entered the vehicle when he was shot,” Hair was authorized “by section 776.013(1), Florida Statutes, to use defensive force intended or likely to cause death or great bodily harm and was immune from prosecution for that action under 776.032(1).”); Fla. Stat. §§ 776.013, 776.032.

18 New Stand Your Ground laws throughout the states generally encompass a broader castle doctrine, as well as the elimination of the duty to retreat when outside one’s “castle.” See Judith E. Koons, Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines, 14 J.L. & Pol’y 617, 618 n.3 (2006) (offering a more detailed discussion of the duty to retreat). Most states, however, do not combine immunity with any presumption of reasonable fear. See id.

19 A castle is described by the statute as “a dwelling, residence, or occupied vehicle.” Fla. Stat. § 776.013(1)(a).
preference of reasonable fear establishes an affirmative defense when a person has used "defensive force that is intended or likely to cause death or great bodily harm to another" who has invaded the person's castle.\textsuperscript{20} Alone, a presumption of reasonable fear is rebuttable because it establishes only an affirmative defense that the prosecution could attempt to overcome at trial.\textsuperscript{21} Immunity, on the other hand, creates a complete bar to criminal prosecution and civil action.\textsuperscript{22} Therefore, a person claiming to have acted in self-defense within the individual's own castle cannot be arrested, detained in custody, charged, or prosecuted at all.\textsuperscript{23} Together, the combination of a presumption of reasonable fear and immunity converts the presumption of reasonable fear from a rebuttable affirmative defense into an irrebuttable conclusion and absolute bar to prosecution.

This combination is first problematic because irrebuttable presumptions are nearly always unconstitutional.\textsuperscript{24} Second, the immunity statute essentially requires law enforcement to make determinations of immunity

\textsuperscript{20} FLA. STAT. § 776.013(1).

\textsuperscript{21} See People v. Guenther, 740 P.2d 971, 976 (Colo. 1987) (en banc).

\textsuperscript{22} See FLA. STAT. § 776.032 (2005). The statutory text reads as follows:

(1) A person who uses force as permitted in [section] 776.012, [section] 776.013, or [section] 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in [section] 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

\textit{Id.} § 776.032(1)-(2).

\textsuperscript{23} See id.

\textsuperscript{24} Tot v. United States, 319 U.S. 463, 467 (1943) (holding "a statutory presumption [is unconstitutional] if there [is] no rational connection between the fact proved and the ultimate fact presumed"). If a statutory presumption cannot be rebutted or proof offered against it, then the rationality of the connection can never be questioned. Thus, an irrebuttable presumption is necessarily unconstitutional. \textit{See id.} at 468.
DEADLY COMBINATIONS

without providing any guidelines on how to make this decision. Third, once granted, there is no mechanism to withdraw immunity if it was improperly granted; in other words, if law enforcement decides a person is entitled to immunity, the statute does not provide a way for the prosecutor to review the case and withdraw that immunity, if warranted. In fact, the prosecutor may not even receive notification of the incident since law enforcement would not sign a complaint if it granted immunity pursuant to statute. Finally, if a person who is entitled to immunity is actually charged, the statute provides no mechanism by which a defendant may assert immunity. This final problem has resulted in each Florida appellate district interpreting the law uniquely, without uniform application of the statute.

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25 See FLA. STAT. § 776.032; Peterson v. State, 983 So. 2d 27, 28 (Fla. Dist. Ct. App. 2008), reh’g denied.


27 See Bartlett, 993 So. 2d at 160 (stating that “[i]n a homicide, an officer cannot properly sign a criminal complaint if the evidence shows the killing was justified”).

28 Id.

29 The First District has ruled that a “motion to dismiss based on ‘Stand Your Ground’ immunity cannot be denied because of the existence of disputed issues of material fact.” Hair v. State, 17 So. 3d 804, 805 (Fla. Dist. Ct. App. 2009) (per curiam); Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008), reh’g denied. The Fourth District has ruled that “a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact.” Dennis v. State, 17 So. 3d 305, 306 (Fla. Dist. Ct. App. 2009); accord Velasquez v. State, 9 So. 3d 22, 23 (Fla. Dist. Ct. App. 2009), reh’g denied; Govoni v. State, 17 So. 3d 809, 810 (Fla. Dist. Ct. App. 2009) (order amending opinion on grant of clarification) (per curiam). To claim immunity, the First District, as followed by the Fifth District, requires the trial court to conduct “an evidentiary proceeding in which the criminal defendant has the burden of proof by a preponderance of the evidence.” Gray v. State, 13 So. 3d 114, 115 (Fla. Dist. Ct. App. 2009) (on motion for certification) (citing Peterson, 983 So. 2d at 29). The Fifth District has adopted the procedure for asserting immunity described in Peterson, but it has approved the practice at the trial court level of conducting “both a Peterson-type hearing, as well as a rule 3.190(c)(4) hearing” to determine immunity. Gray, 13 So. 3d at 115. Additionally, the First District agrees with the Second District that “[t]he creation of section 776.013 eliminated the burden of proving that the defendant had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such.” Bartlett, 993 So. 2d at 163 (quoting State v. Heckman, 993 So. 2d 1004, 1006 (Fla. Dist. Ct. App. 2007)). However, the Second District does not recognize immunity where the aggressor is in the process of retreating, but the First District does recognize immunity even where the aggressor is arguably retreating. See Heckman, 993 So. 2d at 1006; Hair, 17 So. 3d at 806.
Hence, even though the law is meant to prevent prosecution of a person acting in self-defense, a defendant who is not initially granted immunity by law enforcement or the prosecutor could spend years attempting to assert immunity. Moreover, the appellate courts' interpretation of the immunity statute has been incorrect, as the courts generally require a defendant to prove by a preponderance of the evidence an entitlement to immunity, in criminal matters, the prosecution bears the burden of proof, and this burden should not be shifted to the defendant at any time.

The purposes of this Article are to show (1) how the pairing of the immunity statute with the presumption of reasonable fear codified in Florida statute section 776.013 creates an absolute and irrebuttable presumption of self-defense, (2) why this irrebuttable presumption is problematic, and (3) how the incorrect application of the law to actual cases results in inconsistent outcomes in factually similar cases. Additionally, this Article identifies weaknesses in the statute that must be immediately corrected to ensure equal and fair application of the law throughout the state. This analysis should serve as a guide to other states considering similar legislation.

The analysis contained herein is important because numerous states have passed, or are considering implementing, statutes similar to the one passed in Florida. Although analyzing proposed language being considered in other states is beyond the scope of this Article, it is the author's sincere objective that the deliberative process in these states will benefit from exposing and examining in detail the flaws in the fabric of the

30 See Brown, supra note 3.

31 See Peterson, 983 So. 2d at 29; Gray, 13 So. 3d at 115.

32 See Behanna v. State, 985 So. 2d 550, 555 (Fla. Dist. Ct. App. 2008) (“When the defense presents a prima facie case of self-defense, the State has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.”) (citing Fowler v. State, 291 So. 2d 708, 711 (Fla. Dist. Ct. App. 2006)).

33 The National Rifle Association has a strong lobby throughout the nation, which encourages passage of bills like that in Florida. See generally NAT’L RIFLE ASS’N, INST. FOR LEGIS. ACTION, http://www.nraila.org (last visited Dec. 1, 2010). Pennsylvania recently considered such a bill. House Bill No. 1926, for example, created a Stand Your Ground provision, although it did not entirely eliminate a duty to retreat. It stated, in part, that “no person should be required to surrender his or her personal safety to a criminal, nor should a person be required to needlessly retreat in the face of intrusion or attack outside the person’s home or vehicle.” However, Governor Rendell vetoed the bill. See Marc Levy, Self-Defense Gun Bill Vetoed by Rendell, THE TIMES LEADER (Nov. 28, 2010), http://www.timesleader.com/news/Self-defense_gun_bill_vetoed_by_Rendell_11-28-2010.html.
Florida law. Therefore, while this Article focuses narrowly on Florida’s Stand Your Ground law, its application is much broader.

Below, Section II details a brief history of the evolution of the castle doctrine. Section III explains Florida’s immunity statute and its current castle doctrine, including the presumption of reasonable fear, and it shows how the coupling of immunity and the presumption of reasonable fear creates an absolute bar to prosecution in castle self-defense cases. It further exposes the conflict among the appellate courts in interpreting the immunity statute and the errors in the courts’ reasoning. Section IV offers solutions for lawful and just application of immunity in the context of self-defense. Section V concludes that the combination of immunity and the presumption of reasonable fear creates an irrebuttable and absolute presumption that an individual killing or harming within the castle has acted in self-defense. The lack of guidelines and procedural rules results in the inconsistent investigation and prosecution of criminal offenses throughout the state. Furthermore, the courts are reluctant to recognize this irrebuttable presumption and have created procedural blocks to the assertion of immunity, even where a defendant should be immune from prosecution. Thus, the legislature should revisit the statute, eliminating the presumption of reasonable fear, and the Florida Supreme Court should establish rules of procedure for asserting immunity when a criminal case is initiated, but a defendant is arguably entitled to immunity.

II. The Evolution of the Duty to Retreat and the Castle Doctrine

Historically, English common law “favored a retreat ‘to the wall,’ out of the concern that ‘the right to defend might be mistaken as the right to kill.’”\textsuperscript{34} This duty to retreat is grounded upon respect for the sanctity of human life.\textsuperscript{35} The only exception recognized at common law was known as the castle doctrine—the right to defend an attack in the home.\textsuperscript{36} The

\begin{footnotesize}
\begin{enumerate}
\item See Koons, \textit{supra} note 18, at 640.
\item See Catalfamo, \textit{supra} note 34, at 505.
\end{enumerate}
\end{footnotesize}
castle doctrine is rooted in the "maxim [that] a 'man's home is his castle.'" No one attacked in the home is required to retreat, but rather can use deadly force to defend against the attack.

The duty to retreat is the counterbalance to the castle doctrine and demonstrates reverence for the sanctity of life. The duty to retreat protects individuals by requiring an actor to avoid an altercation unless his back is to the wall. This means, if someone attacks a pedestrian on the street, the pedestrian has a duty to run away or otherwise avoid engaging with the attacker, so long as it is reasonably safe to do so.

As the American rule of law developed, a number of states recognized and followed the common law requiring individuals to retreat in the face of danger, unless that danger arose in the home. Some jurisdictions, however, began adopting the Stand Your Ground rule, which permits an individual to defend against violence without retreating, so long as the individual is lawfully present in that place. Philosophically speaking, the Stand Your Ground rule is rooted in the concept that a person has the right to defend one's honor, whereas the duty to retreat recognizes a reverence for life.

Prior to 2005, Florida broadly interpreted the castle doctrine to include not just the home and surrounding curtilage, but also the workplace. Notably, Florida required retreat where a controversy arose outside the castle or between two or more persons lawfully present within the castle. Additionally, self-defense was an affirmative defense an accused

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37 *Id.* (quoting Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.)).

38 See *id.* at 507.

39 See *id.* at 522.

40 See *id.* at 542. For a detailed listing of states and their doctrines, see Koons, *supra* note 18, at 629 n.41.


42 Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999) (stating that "an individual is not required to retreat from the residence before resorting to deadly force in self-defense, so long as the deadly force is necessary to prevent death or great bodily harm"), *reh'g denied*; Frazier v. State, 681 So. 2d 824, 825 (Fla. Dist. Ct. App. 1996) (agreeing that the castle doctrine is an exception to the general duty to retreat, and it "extends to protect persons in their place of employment while they are lawfully engaged in their occupation").

43 See Frazier, 681 So. 2d at 825. *But see Weiand*, 732 So. 2d at 1051 (holding that there is no "duty to retreat from the residence when a defendant uses deadly force in
could assert in response to a criminal prosecution. Florida did not grant immunity to purported acts of self-defense.

Some states, such as Colorado, did grant immunity to anyone acting in self-defense in accordance with the law. To claim immunity, however, a defendant’s actions had to clearly reflect that the defendant reasonably believed the use of force was necessary. In other words, even in states with broad self-defense laws, individuals claiming self-defense must establish their reasonable belief that the use of force was necessary. Reasonable fear is not presumed.

After 2005, Florida became the first and only state to couple immunity with a presumption of reasonable fear when a person acts in self-defense within the castle. A person claiming self-defense for a violent act occurring outside the castle is also entitled to immunity, but would need to establish the reasonableness of the use of force prior to receiving immunity. A person’s violent act within the home, however, is presumed to result from a reasonable fear.

III. From the Duty to Retreat to “Stand Your Ground”—Three Major Changes Encompassed by Florida’s Statute

In 2005, the Florida legislature amended one statute (eliminating the duty to retreat) and added two (expanding the common law concept of self-defense, if that force is necessary to prevent death or great bodily harm from a co-occupant).

46 Id. § 18-1-704.5(2); People v. Guenther, 740 P.2d 971, 979 (Colo. 1987) (en banc). In drafting its statute, the Colorado legislature initially considered including “a presumption that a homeowner’s use of deadly physical force against an intruder was reasonable and had redrafted the provision to state that the person ‘shall not be prosecuted—shall be immune from prosecution.’” Guenther, 740 P.2d at 976.
47 See Koons, supra note 18, at 618 n.3.
48 Id.
49 Id.
“castle” to include motor vehicles and granting immunity to anyone claiming to act in self-defense). These changes introduced a coupling of immunity and a presumption, a unique development for these types of statutory schemes. This combination exponentially compounds the problems associated with Stand Your Ground laws, and states have historically declined to pass laws giving both immunity and recognizing presumptions for this reason.

These laws are not only ripe for abuse by would-be criminals, but they also provide absolutely no guidance to law enforcement, prosecutors, defendants, or the courts on how to assert immunity or claim a presumption under the law. This lack of direction has caused the appellate districts in Florida to interpret the law differently, and has created confusion for law enforcement and citizens of the state.

A. Shoot First, Ask Later: Eliminating the Duty to Retreat

The National Rifle Association (NRA) has been fiercely lobbying state legislatures around the nation for broader gun and self-defense laws. In Florida, the NRA’s proposals saw nearly no opposition during the strong and quick lobby. Prior to amending section 77.012 in 2005, an individual who felt threatened outside the home or workplace had a duty to retreat to the wall and could only meet force with force where no safe

\[\text{See Koons, supra note 18, at 618 n.3.}\]

\[\text{Some problems include valuing “dignity” and “pride” over the sanctity of life and encouraging individuals to resort to violent resolution of problems as opposed to implementing a civilized approach. Criminals are also encouraged to resolve conflicts within a recognized “castle” so as to take advantage of the presumption of reasonable fear and immunity to avoid prosecution. See Steven Jansen & M. Elaine Nugent-Borakove, Nat’l Dist. Attorneys Ass’n, Expansions to the Castle Doctrine: Implications for Policy and Practice Ass’n, Expansions to the Castle Doctrine: Implications for Policy and Practice (2007), available at http://www.ndaa.org/pdf/Castle%20Doctrine.pdf.}\]

\[\text{See Catalfamo, supra note 34, at 528.}\]

\[\text{Id. at 514.}\]


\[\text{Id.}\]
means of escape was available. Today, section 776.012 provides, in part, that

a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

Known as the “Stand Your Ground” law, this statute is flawed because it places a greater power on the right to possess and use a gun than it does on the most fundamental right of all: life itself. Under common law, an individual was required to retreat before resorting to physical force, so long as retreat could be safely accomplished. The law has always recognized that, where no safe method of retreat is available, a person may meet force with force in defense of an attack. Now, anytime one claims to perceive a threat, that individual would be justified in reacting violently; they would have little incentive to diffuse the situation by retreating.

To illustrate where this statute can cause problems, imagine two rival gang members cross paths on a public sidewalk where they each have a right to be, they each have a right to stand their ground. Either gang member can perceive or claim to perceive a threat from the other, and acting in self-defense, use physical force against the other. Under the

58 See Michael, supra note 56, at 200; Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999), reh'g denied; Frazier v. State, 681 So. 2d 824, 825 (Fla. Dist. Ct. App. 1996) ("The general rule is that a person attacked is not justified in using deadly force if, without increasing the danger, he can avoid the difficulty by retreating.").

59 Fla. Stat. § 776.012 (2005). Subsection (2) of the statute further provides that a person does not have a duty to retreat “[u]nder those circumstances permitted pursuant to [section] 776.013.” Id.; see infra subsection III(B) (more fully discussing this provision and its implications).

60 See Michael, supra note 56, at 200; Weiand, 732 So. 2d at 1049; Frazier, 681 So. 2d at 825. Note that the duty to retreat only applied when an individual was outside his home or workplace. Florida law has never required an individual to retreat from the castle, which previously included both the home and the workplace. See Weiand, 732 So. 2d at 1049; Frazier, 681 So. 2d at 825.

61 See Michael, supra note 56, at 200 n.8. In signing the bill, Governor Jeb Bush reinforced his supporting position by stating “to have to retreat to put yourself in a very precarious position defies common sense.” Id.
current statute, the person acting in self-defense does not need to prove any actual threat.\textsuperscript{62} That person is justified in injuring, or even killing, the other person. Most disturbing, the individual claiming to act in self-defense is not required to walk away even if presented with a safe method of retreat.\textsuperscript{63}

Proponents of the Stand Your Ground statute claim that a person should have the right to “stand like a man” to avoid the humiliation of retreating in the face of a fight.\textsuperscript{64} Yet this argument neglects a basic premise of civilized society: respect for life.\textsuperscript{65} The most self-evident truth, according to the signers of the Declaration of Independence, is that “all men . . . are endowed . . . with certain unalienable Rights [including] Life, Liberty, and the pursuit of Happiness.”\textsuperscript{66} The role of government, therefore, should be to protect life and not create laws jeopardizing the lives of others.

Overly-broad Stand Your Ground statutes place lives in danger because a person is permitted to harm, or even kill, another before considering whether an actual threat exists. Certainly, some situations would call for an individual to act in self-defense where safe retreat is not available; the common law provided for this reality.\textsuperscript{67} The benefit of the duty to retreat is that it makes a person think twice before using force against another and, in the long term, acts to preserve peace and life.

\section*{B. Expanding the Concept of the Castle}

The second major change in the self-defense statutes adds section 776.013 to modify the common law definition of castle and to create a presumption of reasonable fear justifying the use of deadly force in one’s castle.\textsuperscript{68} Now, in Florida, the workplace is no longer considered part of

\begin{footnotes}
\item \textsuperscript{62} See FLA. STAT. § 776.012 (2005); Michael, supra note 56, at 199.
\item \textsuperscript{63} Michael, supra note 56, at 201.
\item \textsuperscript{64} See Catalfamo, supra note 34, at 534.
\item \textsuperscript{65} See id. at 515.
\item \textsuperscript{66} See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).
\item \textsuperscript{67} See Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999), reh'g denied.
\item \textsuperscript{68} FLA. STAT. § 776.013 (2005); see discussion supra note 22 (quoting FLA. STAT. § 776.013(a)-(b)). Under common law, the castle was defined as one’s home. See Catalfamo, supra note 34, at 512. Some jurisdictions, such as Florida, expanded the
\end{footnotes}
the castle, but an occupied motor vehicle is. 69 Defining a motor vehicle as a person's castle, however, is too broad because it is inconsistent with the purpose of the castle doctrine. The castle is intended to be a sacred place and is afforded special protections because one should not have to abandon this sacred locale in the face of an attack. 70

A person who is inside a car or other motor vehicle typically does not have a "back against the wall," which would more likely exist in a castle, or a home. Because the vehicle is a mode of transportation, a person feeling threatened has a safe and easy method of retreat in most cases. Moreover, driving away protects both the person perceiving a threat and the person allegedly making the threat. 71 Finally, while the castle doctrine itself is premised on the sanctity of the home, motor vehicles have never been recognized as carrying that same "sacred retreat" value. 72 Therefore, motor vehicles should not be included in the definition of "castle."

The more problematic portion of section 776.013, however, is the language providing that "[a] person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another." 73 This provision is the primary definition of castle to include curtilages, property, and even the workplace. See Weiand, 732 So. 2d at 1049; Frazier v. State, 681 So. 2d 824, 825 (Fla. Dist. Ct. App. 1996).

69 Id. § 776.013(1)(a); see supra note 12 (quoting FLA. STAT. § 776.013(1)(a)).

70 See Koons, supra note 18, at 618. Theoretically, the home is as far as one can retreat; it is the ultimate "back against the wall" scenario, and therefore, an individual is entitled to act with force to protect himself and others without abandoning the castle.


72 "The Castle Doctrine came from English law, based on the saying, 'a man's home is his castle,'" says local attorney Bill Richardson. "What is contained in your home is your family, your most precious asset as a human." Todd Baucher, A Man's Home: The Castle Doctrine, WTAP NEWS (Nov. 9, 2009, 6:49 PM), http://www.wtap.com/news/headlines/69611472.html; see also Catalfamo, supra note 34, at 526-27; Smiley v. State, 927 So. 2d 1000, 1003 (Fla. Dist. Ct. App. 2006) (finding Stand Your Ground created a new right without a duty to retreat when attacked in one's vehicle), reh'g denied.

distinction between Florida statute sections 776.012 (Stand Your Ground) and 776.013 (castle doctrine). Without this presumption, the castle in Florida would be no more sacred than anywhere else someone has a right to be; it would not be necessary to distinguish the castle from any other place.\(^7\) By including a presumption of reasonable fear, however, the statute continues the tradition of elevating the castle to sacred status. In other words, a person claiming self-defense for a violent act committed within the castle is not even required to assert a reasonable fear or perceived threat because the law automatically presumes reasonable fear.\(^7\)

To understand why the presumption presents a problem, it is necessary to compare the common law with the current statute. Prior to the passage of the 2005 statute, law enforcement was not limited in any way in the investigation of violent acts.\(^7\) Once law enforcement established probable cause that an act of violence had occurred, the accused bore the burden of asserting any defense, including self-defense (that the act arose as a result of reasonable fear of bodily harm).\(^7\) Now, under the 2005 statute, law enforcement is limited in the investigation of violent crimes that occur within the castle because it must presume the individual acted out of a reasonable fear.\(^7\)

The presumption of reasonable fear in the new statute drastically changes how law enforcement can investigate acts of violence within the castle. Although section 776.032(2) provides "[a] law enforcement agency may use standard procedures for investigating the use of force,"\(^7\) law enforcement is prohibited from arresting or detaining in custody any individual who uses force in the castle until "there is probable cause that the force that was used was unlawful."\(^7\) Establishing probable cause as required by section 776.032 is virtually impossible, however, because

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\(^7\) As discussed in subsection III(A), supra, a person may meet force with force under perceived threat of attack so long as that person has a right to be in that place.


\(^7\) Florida statute section 776.032 did not exist prior to 2005.


\(^7\) FLA. STAT. § 776.013 (2005); see also Bartlett, 993 So. 2d at 163.

\(^7\) FLA. STAT. § 776.032(2) (2005).

\(^7\) Id.
law enforcement must presume the use of force was lawful pursuant to section 776.013. Because law enforcement is only authorized to investigate unlawful acts, it is essentially precluded from investigating violent acts occurring within the castle. As a result, probable cause can never be established where an individual commits a violent act within the castle.81

C. Adding Immunity

In addition to eliminating the duty to retreat and expanding the concept of the castle, Florida has provided immunity to anyone who acts in self-defense.82 The purpose of immunity is to eliminate the fear of prosecution experienced by those who may act in self-defense.83 While the costs and time associated with defending a lawful violent act may be significant, the potential for abuse and inconsistent application of the statute make this law injudicious. Additionally, the statute fails to accomplish its purpose because there are no guidelines for establishing or asserting immunity.84 Moreover, coupling immunity with the presumption of reasonable fear defined in Florida statute section 776.013 creates a practically impenetrable wall of protection around anyone committing an act of violence within the castle, even if the act is unlawful.

The lack of rules and guidelines for implementing the statute creates the potential for unequal and inconsistent application of the statute. In effect, law enforcement is called to make prosecutorial decisions without

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81 This assertion is true assuming any of the four statutory exceptions to the presumption are inapplicable. See Fla. Stat. § 776.013(2)(a)-(d). Where the facts arise under one of the listed exceptions, law enforcement may not presume the perpetrator acted out of reasonable fear of imminent peril or great bodily harm, and it may conduct a full investigation. If probable cause is established, the perpetrator would be arrested and could assert any defense. Further discussion and analysis of these sections are beyond the scope of this Article.

82 Fla. Stat. § 776.032 (2005); see supra note 22 (quoting Fla. Stat. § 776.032 (1)-(2)). Immunity from prosecution where one acts in self-defense has no root in common law and gives broad protection to those who claim to act in self-defense.

83 Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) ("[T]he legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.") (quoting 2005-27 Fla. Laws 200), reh'g denied.

84 See id.; Fla. Stat. § 776.032.
consulting the prosecutor because law enforcement is charged with making the initial immunity determination. The immunity statute prohibits the detention or arrest of any individual who has acted in accordance with sections 776.012 or 776.013. Law enforcement officers, however, are not trained to conduct the legal analysis required by such determinations of immunity, and the statute provides absolutely no guidance. Unfortunately, immunity will be granted based on an officer’s individual assessment rather than pursuant to a uniform decision-making process. This will certainly result in the disparate treatment of factually similar cases throughout the state.

As it relates to the castle doctrine, the immunity statute creates another problem because it requires law enforcement to disprove a presumption rather than establish a case. Prior to 2005, law enforcement was required only to establish that an unlawful act of violence had occurred and forward evidence to the state attorney to determine whether to prosecute. Law enforcement was not responsible for rebutting any presumptions or defenses prior to filing a report, detaining a suspect, or making an arrest.

Since passing the 2005 statute, however, ruling out self-defense is “part of the statutory requirement for [law enforcement] to be able to sign [a] complaint.” In other words, rather than just simply investigating the unlawful act of violence, law enforcement must also establish thatself-defense is not a valid defense. This is a significant change in the investigative process.

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85 FLA. STAT. § 776.032(1); see Velasquez v. State, 9 So. 3d 22, 23 (Fla. Dist. Ct. App. 2009), reh ’g denied; Bartlett v. State, 993 So. 2d 157, 159-60 (Fla. Dist. Ct. App. 2008).
86 FLA. STAT. § 776.032(1). In fact, a defendant in a civil action can recover expenses—including attorneys fees, court costs, and loss of income—if the court determines the person was immune from prosecution. Id. § 776.032(3).
87 JANSEN & NUGENT-BORAKOVE, supra note 53, at 9.
88 See Bartlett, 993 So. 2d at 159-60.
91 See Bartlett, 993 So. 2d at 159-60.
92 Id. at 158. However, the appellant argued that the new statute was not a substantive change to how crimes are investigated. Id. at 160. Rather, law enforcement must not only establish probable cause that a crime has occurred, but also seek to rule out an affirmative defense (self-defense) to determine entitlement to immunity. Id. at 159-60. It goes beyond figuring out whether a crime occurred; the statute requires police to make the defendant’s case and then disprove it beyond a reasonable doubt.
and reporting the facts, law enforcement must now engage in an evaluation of those facts and make decisions that will affect whether or not a person will be accused of a crime.\(^9\) This law effectively removes from the province of the court the determination of a perpetrator’s guilt or innocence and vests this decision in the police (or other investigating authority). Additionally, obtaining such evidence is complicated since law enforcement is only authorized to investigate *unlawful* acts, and section 776.013 requires officers to presume acts of violence within the castle are *lawful*.\(^9\)

In the event law enforcement does obtain probable cause and prosecution is initiated, the statute fails to guide prosecutors, courts, and defendants on how to invoke immunity.\(^9\) This has resulted in the inconsistent prosecution and treatment of similarly situated defendants throughout the state of Florida.\(^9\) In the initial investigatory stage, no two jurisdictions in Florida agree entirely on how to apply the Stand Your Ground laws to actual cases. For example, in Volusia County, law enforcement granted immunity to a man, Dayne Rollins, who shot three individuals attempting to rob his home, but it might charge him with possessing the short-barreled shotgun he used to defend himself because it had been illegally altered.\(^9\) Notably, Rollins did not fire any shots until the suspects fled his home.\(^9\) On the other hand, in Seminole County, a

\(^{93}\) Velasquez v. State, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009) (citation omitted) ("The statute [776.032] . . . provides for law enforcement to make an initial determination of whether there was probable cause that the force used was unlawful. This allows law enforcement officers to determine a suspect's immunity prior to making an arrest."), reh'g denied; see FLA. STAT. § 776.032 (2005).

\(^{94}\) See FLA. STAT. § 776.013.

\(^{95}\) See Peterson v. State, 983 So. 2d 27, 28 (Fla. Dist. Ct. App. 2008) (observing that "no rule or procedure had yet been enacted to guide trial courts in determining a claim of immunity brought under section 776.032(1)"); reh'g denied.


convicted felon was granted immunity by law enforcement when he killed a man who broke into his home; he will not be charged with possession of a firearm by a convicted felon. Each of these charging decisions, however, seems contrary to section 776.013, which provides that the presumption of reasonable fear is inapplicable where "[t]he person who uses defensive force is engaged in an unlawful activity." Moreover, these cases evidence a lack of uniformity in the application of sections 776.013 and 776.032.

The term "unlawful activity" in section 776.013 is vague, and it is applied inconsistently throughout the state. Notably, the alleged unlawful activity does not have to be related to the act of self-defense. For example, a person who is driving without a license in violation of Florida statute section 322.341 is not entitled to the same presumption of reasonable fear if someone breaks into his occupied vehicle as someone who is not engaged in any illegal activity at all. Likewise, a convicted felon is not entitled to the presumption of reasonable fear if, in the act of self-defense, the felon uses a gun.

By not defining the term "unlawful activity," the statute gives rise to numerous questions. Must the activity actually be a crime, or is a violation of an ordinance sufficient? Must the activity rise to the level of a felony, or is a misdemeanor sufficient? Must law enforcement charge the crime for it to be used in withholding the presumption of reasonable fear? Must the crime result in a conviction before it can be used to withhold the presumption of reasonable fear? This statute fails to put the defendant on notice of what precludes entitlement to the presumption of reasonable fear and, therefore, immunity.

The confusion and inconsistent application of the law increases as cases proceed through the court system. For example, during the summer

99 Taylor, supra note 97 ("Carlton Montford, 50, who has a lengthy criminal record, not only won't face charges in fatally shooting a man who broke into his home... but he also won't be charged with possession of a firearm by a convicted felon.").

100 FLA. STAT. § 776.013(2)(c) (2005).

101 FLA. STAT. § 322.34 (2008).

102 See Taylor, supra note 97. Notwithstanding, in both Seminole and Volusia Counties, convicted felons were granted immunity from prosecution for alleged self-defense acts, despite the fact that they were not entitled to the presumption of reasonable fear because they were engaged in unlawful activity, to wit: possession of a firearm by a convicted felon. See id.
DEADLY COMBINATIONS

of 2009, the First District Court of Appeal in *Hair v. State* ordered the release of Jimmy Ray Hair after two years of incarceration awaiting trial.\(^{103}\) Hair shot and killed an individual who allegedly attacked him through the open window in a car.\(^{104}\) At the time Hair shot his attacker, however, the intruder was actually retreating from Hair's vehicle.\(^{105}\)

In a factually similar case, *State v. Heckman*, the Second District Court of Appeal ruled differently.\(^{106}\) David Heckman shot an intruder after the intruder left the garage attached to Heckman's home, and the Second District ruled that Heckman was not entitled to immunity.\(^{107}\) The two cases directly conflict because the First District claims that the statute "makes no exception from the immunity when the victim is in retreat,"\(^{108}\) but the Second District claims that "immunity does not apply [where] the victim was retreating."\(^{109}\)

The conflicts do not end here. Although all jurisdictions agree that an individual claiming self-defense is entitled to a hearing to determine whether immunity should be granted, the methods for invoking immunity and the applicable burden of proof are disputed.\(^{110}\) Because no rule of criminal procedure establishes a particular process for asserting immunity, many defendants resort to Florida Rule of Criminal Procedure 3.190,\(^{111}\) and at least one defendant has asserted immunity by filing a motion under section 775.032.\(^{112}\)

A Rule 3.190(c)(4) motion to dismiss is proper where "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant."\(^{113}\) Thus, a defendant is required to swear to the facts asserted in the motion to dismiss, and the motion

\(^{103}\) 17 So. 3d 804 (Fla. Dist. Ct. App. 2009) (per curiam).

\(^{104}\) *Hair*, 17 So. 3d at 804.

\(^{105}\) *Id.* at 806; *see* Brown, *supra* note 3.

\(^{106}\) 993 So. 2d 1004 (Fla. Dist. Ct. App. 2007).

\(^{107}\) *Heckman*, 933 So. 2d at 1005-06.

\(^{108}\) *Hair*, 17 So. 3d at 806.

\(^{109}\) *Heckman*, 993 So. 2d at 1004.

\(^{110}\) *See* cases cited *supra* note 29.

\(^{111}\) *FLA. R. CRIM. P.* 3.190(c)(4).

\(^{112}\) *FLA. STAT.* § 775.032 (2005); *see* Peterson v. *State*, 983 So. 2d 27, 28 (Fla. Dist. Ct. App. 2008), *reh g denied.*

\(^{113}\) *FLA. R. CRIM. P.* 3.190(c)(4).
must be denied where the prosecution files a traverse because it "place[s] essential material facts in dispute." In the context of an immunity assertion, however, facts may be disputed where a defendant would nonetheless be entitled to immunity. Herein lies the controversy.

Holdings from the Fourth District firmly establish that "a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact." The Fourth District's reasoning directly conflicts with the First District Court of Appeal's holdings in Peterson v. State and Hair. The Peterson court recognized that the Florida legislature intended to grant true immunity, as opposed to merely an affirmative defense, in passing the Stand Your Ground laws. Thus, the First District reasoned that a trial "court may not deny a motion simply because factual disputes exist." The First District again recognized, in Hair, "that a motion to dismiss based on 'Stand Your Ground' immunity cannot be denied because of the existence of disputed issues of material fact." The Second District appears to agree, in part, with the First District by permitting assertion of immunity via a motion to dismiss and requiring fact-finding by the court. Nevertheless, the Second District does not identify any particular burden of proof or test that must be met by either the defendant or the prosecution in an immunity claim.

The First District went on to require "that a criminal defendant claiming protection under the statute . . . demonstrate by a preponderance of the evidence that he or she is immun[e] from prosecution." Accord-

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115 See Hair, 17 So. 3d at 805; Peterson, 983 So. 2d at 28.
117 983 So. 2d 27, 28 (Fla. Dist. Ct. App. 2008), reh’g denied.
118 Peterson, 983 So. 2d at 29.
119 Id.
120 Hair, 17 So. 3d at 806.
122 Id.
123 Peterson, 983 So. 2d at 28; accord Hair, 17 So. 3d at 805 ("The defendant bears the burden to prove entitlement to the immunity by a preponderance of the evidence.").
ingly, the appellate court seems to require the trial court to conduct a hearing, or at least sufficient fact-finding, to determine whether the defendant has met his burden. In making its decision in Peterson, the First District analyzed People v. Guenther, a Colorado Supreme Court case decided under a similar statute. Although the First District noted that the Guenther decision "imposed the same burden of proof as it would in . . . motions to suppress," in adopting the same standard in Florida, the First District is actually imposing a higher burden than that required for motions to suppress.

In Florida, for a motion to suppress, the defendant need only establish a prima facie case that a search or seizure was unlawful pursuant to the Fourth Amendment. Upon meeting this initial low threshold burden, the burden shifts to the State to prove by clear and convincing evidence that the search and seizure were in fact lawful. In the majority of cases, the defense is not even required to call any witnesses and may rely on its unsworn motion to meet its burden. Thus, requiring a defendant

\begin{footnotes}
\item[124] See Peterson, 983 So. 2d at 29.
\item[125] Id. (citing People v. Guenther, 740 P.2d 971 (Colo. 1987) (en banc)). Notably, Colorado's statute does provide immunity, but it does not provide a presumption of reasonable fear like Florida does in section 776.013.
\item[126] Id.
\item[127] See Mann v. State, 292 So. 2d 432, 433 (Fla. Dist. Ct. App. 1974) (finding "the entire [suppression] hearing was held under the misapprehension that the defendant had the burden of proof with respect to the legality of the warrantless search").
\item[128] See FLA. R. CRIM. P. 3.190(h).
\item[129] See Mann, 292 So. 2d at 433 (explaining that "the ultimate burden of proof as to the validity of a warrantless search is on the State").
\item[130] State v. Hinton, 305 So. 2d 804, 807-08 (Fla. Dist. Ct. App. 1975). The court in Hinton held that

\[t\]he burden is upon the defendant (the moving party) to prove that the search was invalid; that burden can initially be met by a motion asserting the absence of a warrant and the court judicially noticing that its own file in the cause contains no such warrant. When the defendant's initial burden is met, it then shifts to the state to sustain the validity of the search.

\textit{Id.} at 807. This is so because Florida Rule of Criminal Procedure 3.190(h) requires the defendant to submit a motion to suppress stating "clearly the particular evidence sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based." FLA. R. CRIM. P. 3.190(h)(2). A sufficient ground for a motion to suppress includes an allegation that "the property was illegally seized
to establish entitlement to immunity by a preponderance of the evidence is a higher burden than that required for a motion to suppress.\textsuperscript{131}

Additionally, the reasoning in \textit{Guenther} is not transferable to the Florida statute because the Colorado Supreme Court held:

There is nothing in section 18-1-704.5 suggesting that the General Assembly intended to broaden the conditions for statutory immunity to include a home occupant’s right to use any degree of physical force against another person solely on the basis of an appearance, rather than the actuality, of an unlawful entry into the dwelling by that other person.\textsuperscript{132}

In other words, because the Colorado statute did not include a presumption of reasonable fear (such as the one codified in section 776.013), the defendant had the burden of proving entitlement to immunity by a preponderance of the evidence.\textsuperscript{133} The reasoning in \textit{Guenther} is inapplicable because “[t]he creation of section 776.013 eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such.”\textsuperscript{134}

In the preamble to the legislation, the Florida legislature clarified its intent “‘for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action.’”\textsuperscript{135} This immunity is intended to be self-executing, as evidenced by the preamble and also by the plain language of the statute providing that a person acting in self-defense is entitled to immunity from criminal prosecution.\textsuperscript{136} Criminal prosecution “includes arresting, detaining in

\begin{footnotesize}
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  \item \textsuperscript{131} See \textit{Mann}, 292 So. 2d at 433; FLA. R. CRIM. P. 3.190.
  \item \textsuperscript{132} \textit{Guenther}, 740 P.2d at 979.
  \item \textsuperscript{133} \textit{Id}.
  \item \textsuperscript{134} State v. Heckman, 993 So. 2d 1004, 1006 (Fla. Dist. Ct. App. 2007).
  \item \textsuperscript{136} FLA. STAT. § 776.032 (2005).
\end{itemize}
\end{footnotesize}
custody, and charging or prosecuting the defendant."137 Because immunity in Florida is intended to be self-executing in cases involving the castle, requiring the defendant to prove entitlement to immunity by a preponderance of the evidence is fundamentally unfair and contrary to legislative intent.138

Chief Justice Gross of the Fourth District Court of Appeal concurred specially in Govoni v. State,139 recognizing that the decision in Velasquez v. State140 was erroneous.141 He explained his position by citing Rule 3.190(b), which provides "[a]ll defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense."142 Thus, on the one hand, Chief Justice Gross appeared to recognize that the immunity intended by the legislature far exceeds a mere defense, but on the other hand, he attempted to force the application of a procedural rule that contemplates only defenses and imposes a burden of proof that essentially "undercuts the concept of immunity."143 As a final caveat to his concurrence, Chief Justice Gross accepted Peterson v. State's reliance on "[t]he well reasoned explanation of People v. Guenther."144 He failed to realize, however, that the Guenther decision was based on a statute fundamentally different from Florida's.145 Moreover, the reasoning in Guenther would be inapplicable because the standard for deciding motions to suppress in Florida is lower than that required in Colorado.146

137 Id.
138 See Govoni, 17 So. 3d at 811 (Gross, C.J., concurring specially) (stating that "forcing disputed immunity claims to trial undercuts the concept of immunity adopted by the legislature").
139 17 So. 3d 809 (Fla. Dist. Ct. App. 2009) (order amending opinion on grant of clarification) (per curiam).
140 9 So. 3d 22 (Fla. Dist. Ct. App. 2009), reh'g denied.
141 Govoni, 17 So. 3d at 811 (Gross, C.J., concurring specially).
142 Id. (Gross, C.J., concurring specially) (emphasis added) (quoting FLA. R. CRIM. P. 3.190(b)).
143 Id.
144 Id. (citing Peterson v. State, 983 So. 2d 27 (Fla. Dist. Ct. App. 2008), reh'g denied; People v. Guenther, 740 P.2d 971 (Colo. 1987) (en banc)).
145 See supra notes 45-46 & 132-34 and accompanying text.
In *Gray v. State*, the Fifth District Court of Appeal recognized the conflict among Florida’s appellate districts, but refused to certify the question to the Florida Supreme Court. The defendant in *Gray* appealed the trial court’s decision denying immunity after the trial court found that the “[d]efendant did not meet his burden of establishing his claim of immunity by a preponderance of the evidence.” On appeal, the defense urged the court to hold that because the burden remains with the State to prove its case, including the absence of self-defense, the proper approach is to have the court make the determination at a proceeding much like the one *Peterson* requires, except that the burden at such a proceeding would be on the State to establish that the defendant is not entitled to immunity.

The court refused to accept the defendant’s proposal and adopted the *Peterson* test instead. Interestingly, the Fifth District Court of Appeal recognized that “it appears from the number of cases already resulting in opinions and the differing views expressed about how the new statutory immunity should be determined, that this is a question that eventually will require a definitive answer from our high court.”

**IV. Solutions: Can the Statute Be Fixed?**

As previously discussed, numerous problems exist with the Stand Your Ground law, the castle doctrine, and the immunity statute passed by the Florida legislature in 2005. The issues can be divided into two basic categories: those inherent in the language itself and those resulting from a lack of guidelines or rules of procedure on the implementation. Because of the inherent problems, implementing guidelines and procedures will likely not make the statute any better. However, until the legislature has an opportunity to revise the statute, the Florida Supreme Court should issue rules of procedure to assist lower courts in deciding

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147 13 So. 3d 114 (Fla. Dist. Ct. App. 2009) (on motion for certification).
148 *Gray*, 13 So. 3d at 115.
149 *Id.*
150 *Id.*
151 *Id.*
these cases. Guidelines should also be developed to assist law enforce-
ment in the investigation of acts of violence, especially those occurring
within the castle.

A. Inherent Problems

The language of the statutes presents tremendous concerns regarding
acts of violence. Eliminating the duty to retreat creates a mindset to
“shoot first, ask later.” Rather than thinking through the consequences
and attempting a more peaceful solution, individuals are authorized to
act violently in the face of a perceived threat. The reasonableness of any
perceived threat, though, is a matter of opinion and subject to interpreta-
tion. Moreover, since an individual acting pursuant to section 776.012152
is entitled to immunity from prosecution pursuant to section 776.032,153
courts will become much more likely to find an alleged threat reasonable
to ensure compliance with the statute.

The statutory language is even more problematic in the new castle
doctrine because the legislature created a presumption of reasonableness.154
Now, no governmental agency can review the reasonableness
of any alleged threat unless law enforcement can prove a negative—that
there was no reasonable threat. In other words, where a violent act occurs
within the castle, law enforcement must begin by presuming that the act
is lawful and the result of a reasonable perceived threat to the person
committing the act. Because the law presumes the actor to have been in
reasonable fear, obtaining probable cause to rebut this presumption is
nearly impossible.

Coupled with the immunity statute, the Florida legislature has now
created an irrebuttable presumption that a person has acted reasonably
when committing a violent act within the castle.155 In other words, there
is no longer a factual determination to be made regarding the question
of reasonable fear. Read together with section 776.032, which prohibits
the prosecution (including arrest or detention) of anyone acting pursuant

153 Id. § 776.032.
154 See id. § 776.013.
155 See Catalfamo, supra note 34, at 528 n.114.
to the castle doctrine, a person committing a violent act within the castle, as defined in section 776.013, cannot be prosecuted. Irrebuttable presumptions, however, are nearly always unconstitutional.\textsuperscript{156}

Although section 776.032 provides that the state may prosecute an individual where there is probable cause "that the force that was used was unlawful,"\textsuperscript{157} as a practical matter, the state will rarely be able to obtain probable cause for violent acts committed within the statutorily defined castle. This presents an area ripe for abuse by would-be criminals.

Moreover, since law enforcement must presume the individual acted in reasonable fear when the violence occurs within the castle,\textsuperscript{158} the investigatory method must necessarily be altered. Rather than obtaining probable cause that a violent act occurred and allowing a defendant to assert any defense, including self-defense, now, law enforcement must search for evidence to disprove the reasonableness of the act. Officers and detectives are not trained in the nuances of legal analysis and theory to gather, consider, and weigh the evidence in light of the law.\textsuperscript{159}

One option may be for the legislature to provide guidelines or a checklist for investigation of these violent acts, which would cause one of two things to occur. First, law enforcement could become so dependent on the checklist that officers would fail to see the forest for the trees during an investigation. The result would be essentially the same problem that exists now: a defendant entitled to immunity would be sitting in jail trying to assert immunity when it should have automatically been granted. Second, law enforcement could find the guidelines so vague, confusing, or difficult to apply that it would not effectively utilize them anyway. Essentially, officers and detectives would have to engage in the same process currently required by the statute with a few more administrative details, but without any real substantive assistance to help them do their

\textsuperscript{156} Tot v. United States, 319 U.S. 463, 467 (1943) (holding "a statutory presumption [is unconstitutional] if there [is] no rational connection between the fact proved and the ultimate fact presumed"). If a statutory presumption cannot be rebutted or proof offered against it, then the rationality of the connection can never be questioned. Thus, an irrebuttable presumption is necessarily unconstitutional. \textit{See id.} at 468.

\textsuperscript{157} FLA. STAT. § 776.032(2) (2005).

\textsuperscript{158} \textit{See id.} § 776.013.

\textsuperscript{159} The amount of evidence law enforcement is authorized to gather is also questionable under section 776.032, since it cannot arrest or detain anyone in custody. \textit{See id.} § 776.032(1).
job. Therefore, implementation of investigatory guidelines is unlikely to correct the problems inherent in the statute.

Because their language allows for increasingly violent behavior and protects the actor from prosecution, the statutes should be repealed. The former statute provided more than adequate protection to persons truly acting in self-defense: a person only had a duty to retreat where it was reasonably safe to retreat, and a person did not have to retreat from a perceived threat in the home or workplace. Eliminating the duty to retreat, creating a presumption of reasonable fear in the castle, and granting immunity from prosecution shields criminals and protects a much broader array of violent acts than just those legitimately committed in self-defense. Therefore, the statutes should be repealed.

B. Problems in the Application

The interpretation of the statute, and its application to actual cases at the trial and appellate levels, has been inconsistent and unfair throughout the state. The cases analyzed in Section III above represent the courts’ intent to limit the applicability of the immunity statute, and individuals are nonetheless being required to defend legal acts of violence despite the legislature’s intent to grant a true immunity for such acts. Despite the legislature’s intent, law enforcement, prosecutors, and judges are not following the law.

Under case law, a precedent has been established whereby a defendant must prove entitlement to immunity by a preponderance of the evidence. This shifts the burden of proof from the prosecution to the defense. Florida’s statute granting immunity to persons acting in self-defense goes beyond establishing a defense; it establishes a right not to stand trial. By forcing defendants to prove by a preponderance of the evidence that they are entitled not to face prosecution at all, the courts are essentially forcing them to do just that: face prosecution.

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160 See Smiley v. State, 966 So. 2d 330, 334 (Fla. 2007), reh’g denied.
163 Id. (Gross, C.J., concurring specially).
In determining this burden of proof, Florida courts have relied on a Colorado case, People v. Guenther, examining a similar statute. The Colorado statute, however, is different in two crucial ways. First, the Colorado statute does not recognize a presumption of reasonable fear when the act of self-defense occurs within the castle. Second, the court established the burden of proof as "by a preponderance of the evidence" because it is the same burden of proof applied in motions to suppress in Colorado. The standard for a motion to suppress in Florida, however, is lower than "by a preponderance of the evidence." In its Guenther opinion, the Colorado Supreme Court even acknowledged that the analysis and outcome of that case would have been different if such a presumption was in place. Therefore, Florida's reliance on the reasoning in this Colorado case is erroneous. The analysis cannot be applied to Florida's statute because Florida has both immunity and a presumption of reasonable fear. Moreover, the same burden used in Guenther should not be adopted in Florida because it is a higher burden than that currently required by motions to suppress in Florida. Therefore, the same reasoning underlying the Colorado court's decision is inapplicable in Florida.

At first glance, one could presume the problem in judicial interpretation throughout the state could simply be resolved by implementation of rules of procedure. Certainly, creating a rule of procedure outlining a method for asserting immunity and clarifying the appropriate burden of proof would help to normalize the outcomes of factually similar cases throughout the state. Notwithstanding, creation of any guidelines or procedural rules will not resolve the issue presented in the language of

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164 740 P.2d 971 (Colo. 1987) (en banc).
165 See COLO. REV. STAT. § 18-1-704.5(2) (1986).
166 Guenther, 740 P.2d at 980.
168 Guenther, 740 P.2d at 980-81.
169 FLA. STAT. §§ 776.032, 776.013 (2005). Interestingly, the Colorado legislature originally contemplated a statute providing both immunity and a presumption of reasonable fear. The legislature felt such a statute unwise and overbroad, however, because it would create automatic immunity for anyone claiming self-defense. See Guenther, 740 P.2d at 979.
170 See Bicking, 293 So. 2d at 387 (Boyer, J., concurring specially).
the statute itself. Therefore, to require the Florida Supreme Court, or any other body within the state, to promulgate guidelines for the interpretation of the statute would be an effort in futility.

On the other hand, the legislature is not likely to repeal the statute in the near future. Hence, uniformity is necessary, at least at the court level. A rule of procedure could provide that consistency until the legislature has had the opportunity to reconsider the legislation. Any rule would need to clarify that asserting immunity is not the same as asserting a defense since section 776.032\(^1\) is a grant of immunity and not just the preservation of a right to assert an affirmative defense. The rule should clearly establish that, at no time, does the defense bear the burden of proving by a preponderance of the evidence any entitlement to immunity; rather, once the defendant asserts entitlement to immunity, the prosecution should be required to prove, at least to the level of probable cause (if not to a higher burden), that the defendant did not act in reasonable fear.

For cases involving the castle, the presumption created by the statute appears to be irrebuttable, and to that extent, this writer cannot think of any type of procedural rule that would allow the prosecution to overcome this presumption. Therefore, any act of violence occurring pursuant section 776.013\(^2\) should not be prosecuted at all. In the event a prosecution is initiated, the case should be dismissed upon the defendant's prima facie assertion of entitlement to immunity.

**V. Conclusion**

Florida's Stand Your Ground law, castle doctrine, and immunity statute are inherently flawed. To the extent other states are considering similar legislation, they should be strongly cautioned against passing legislation identical to Florida's statutes. In the interest of preserving the sanctity of life, states should consider retaining the duty to retreat. Additionally, the castle doctrine should be confined to the home and curtilage of the home because these are the traditional sacred places. States should also avoid creating any statutory presumption of reasonable


\(^{172}\) Id. § 776.013.
fear that eliminates the factual determination of the justification of a
violent act. Finally, states should not implement an immunity statute as
broad as Florida’s because it essentially preempts the complete investiga-
tion and prosecution of violent acts, even those that may not be justifi-
able.

Although many states have embraced the notion of Stand Your Ground
over the common law duty to retreat, that focus, coupled with immunity,
places a higher value on honor than on life. It makes a mockery of this
democracy and condones civilized men resorting to barbaric behavior.

As evidenced in the district court decisions detailed above, the statutes
have also created a judicial nightmare in Florida. The courts do not know
how to handle cases where the law protects a criminal’s violent act.
Rather than following the law, the courts appear to be imposing burdens
of proof and other requirements to avoid granting immunity and forcing
defendants to trial. In other words, courts are treating immunity like it
is an affirmative defense, and the statute in Florida is clearly a grant of
true immunity. This appears to be the courts’ way of declaring dis-
agreement with the law and forcing what it believes to be truly criminal
acts to trial, despite the statute.

Legislatures throughout the United States should heed the silent
message from the Florida courts: these statutes should not be followed.
In enacting the 2005 laws, the Florida legislature created protection for
both criminal and legitimate self-defense acts. The prior statute protected
only legitimate self-defense acts, the legitimacy of which was determined
by a jury. Now, the actual effect of Stand Your Ground laws, the castle
doctrine, and the immunity statute working together is to allow criminals
to get away with murder.